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No. _____

In the Supreme Court of the United States

GEFFREY WAXMAN AND GAIL WAXMAN, AS PARENT AND NATURAL GUARDIAN OF RICHARD WAXMAN, A MINOR AND RICHARD WAXMAN,
Petitioners,

v.

ROSLYN UNION FREE SCHOOL DISTRICT,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE NEW YORK STATE COURT OF APPEALS, ALBANY

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The Decisions of the Courts of the State of New York, with reference to the federal question involved herein, conflict with the Decision of this Court in *Honig v. Doe*, 484 U.S. 305 (1988).

LIST OF PARTIES

Petitioner

The petitioners, Geffrey Waxman and Gail Waxman, as Parents and Natural Guardians of Richard Waxman, a Minor, and Richard Waxman, have no corporate affiliations.

Respondent

The respondent is the Roslyn Union Free School District.

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Petitioners respectfully petition for a writ of certiorari to review the Decisions of the Courts of the State of New York, with reference to the federal question involved herein.

OPINIONS BELOW

The Decisions and Orders of the Courts of the State of New York are unreported and are reproduced in the Appendix.

JURISDICTION

The Memorandum Decision and Order of the Supreme Court, State of New York (Segal, J.) is dated January 16, 2001. The Decision and Order of the Appellate Division of the Supreme Court of the State of New York, Second Department, which affirmed the Memorandum Decision and Order of the Supreme Court, State of New York is dated January 22, 2002.

Petitioners, by Notice of Motion dated May 22, 2002, moved, pursuant to the New York Civil Practice Law and Rules, before the Appellate Division of the Supreme Court of the State of New York, Second Department, for leave to appeal to the New York State Court of Appeals. By Decision and Order on Motion entered September 18, 2002, the Appellate Division of the Supreme Court of the State of New York, Second Department, denied petitioners' motion. Thereupon, on October 3, 2002, petitioners sought leave to appeal from the New York State Court of Appeals. On December 12, 2002, the New York State Court of Appeals dismissed petitioners' motion to appeal. No rehearing was requested.

STATUTORY PROVISIONS INVOLVED

The statutory provision involved is the Individuals with Disabilities Education Act, (IDEA), 20 U.S.C. §1400 et seq.. 20 U.S.C. §1415(j) states:

"(j) Maintenance of current educational placement

> Except as provided in subsection (k)(7) of this section, during the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents otherwise agree, the child shall remain in the then-current educational placement of such child, or, if applying for initial admission to a public school, shall, with the consent of the parents, be placed in the public school program until all such proceedings have been completed."

STATEMENT OF THE CASE

A. Relevant Facts

Petitioner Richard Waxman entered Respondent District as a fifth grade student at the East Hills Elementary School in November, 1999. Richard and his parents, Geffrey and Gail Waxman, had moved into the District from the Scarsdale, New York District. In March, 2000, the Principal of the elementary school sought an evaluation, through Respondent's Committee on Special Education (CSE), to determine whether Richard was disabled and ought to be classified under relevant state and federal statute. In April, 2000, Richard's parents, believing that the attempted referral

was inappropriate, exercised their right and objected to the referral and evaluation.

Pursuant to regulation, upon the parents' unwillingness to consent to the evaluation, Respondent implemented an administrative procedure to have a Hearing Officer determine if the evaluation should be conducted without the parents' consent. This matter had not yet been heard before a Hearing Officer when the 1999-2000 school year ended. Richard's parents felt that an evaluation for Special Education was inappropriate because in prior academic and psychological testing Richard scored well above average academically and psychologically. Furthermore, his report card grades were at or above grade level and there is no medical evidence that Richard has a disability of any kind.

In September, 2000, Richard entered the sixth grade at the Roslyn Middle School. On October 27, 2000, Richard was suspended from school for two (2) days by the Principal of the Middle School. On November 15, 2000, Richard was suspended for an additional five (5) days or from November 16-28, 2000. The alleged reasons justifying these suspensions, which Petitioners categorically disputed, are contained in the Memorandum Decision and Order of the Supreme Court, State of New York, (Segal, J.). Both of the above suspensions were appealed to Commissioner Richard Mills of the State of New York. In two (2) separate decisions, Commissioner Mills annulled and expunged the suspensions from Richard's record. Also, on November 15, 2000, petitioner Geffrey Waxman filed a police report concerning the second suspension, where school personnel assaulted and chased Richard, a ten year old asthmatic, out of the school building.

At all times, Richard has been found to be highly intelligent and has always achieved good academic grades in school.

While Richard was suspended between November 16-28, 2000 and in retaliation for petitioner Geffrey Waxman having filed the police report, Respondent commenced a judicial proceeding in the Nassau County Supreme Court seeking preliminary injunctive relief enjoining Richard from attending school and suspending him from regular instruction. In support thereof, Respondent alleged that Richard was believed to have a disability and that he had exhibited behavioral problems which warranted his being suspended from regular instruction and barred from the Roslyn Middle School.

Petitioners vehemently contested Respondent's application and a hearing was held before the Supreme Court of the State of New York (Segal, J.) on January 3-4, 2001. It was as a result of this hearing that Justice Segal issued his Memorandum Decision and Order entered January 16, 2001.

At the hearing, Ronald Cohen, a Psychologist, testified on Petitioners' behalf. He noted that Richard would do best in a school setting "where he was able to maximize his interactions with other children in terms of helping to normalize his social skills. Dr. Cohen further noted that he did not believe that Richard was a danger to himself or others. Respondent did not present its own expert to rebut Dr. Cohen.[1]

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[1] Dr. Cohen wrote a letter in February, 2001, stating that Richard's behavior had improved and how important it was for Richard to socialize in a regular school setting.

According to Mr. Palmadesso, the School Principal, most of the incidents involving Richard were minor. However, he cited three alleged incidents which he contended were more major and which formed the basis of Respondent's application for injunctive relief. The first involved the so-called fire drill incident. The second involved an incident where Richard was allegedly "throwing himself against the steel doors of the school." The third involved allegations that Richard improperly sought to obtain chocolate milk from a vending machine in the cafeteria and, when assaulted, ran onto the school grounds. These incidents, it is Petitioners' belief, were not sufficient to impose the drastic action that the New York State Courts ultimately took against Richard.

For example, with reference to the fire drill incident, Perri Peters, Richard's Social Studies Teacher, testified. She stated "Two children had caught Richard coming out of the opposite door and he almost got hit by a car, and they pulled him back in the nick of time and pulled him over to me and I talked with him." During the hearing, the following exchange occurred between Ms. Peters and counsel: "Now did you actually see with your own eyes whether Richard got hit by a car?" Answer: "No, I did not." This, Petitioners assert, constituted a major contradiction in testimony.

Robin Milgrim, Richard's CORE Teacher, testified to the same event. "Almost immediately when we got there, Richard was running down the sidewalk and was running down into the traffic circle and there were no other students or adults aside from the other teacher or I yet, and he came running out and proceeded to run right across the traffic circle, and a parent who was either dropping someone off or picking up, came pretty close, a foot or so, I would say, maybe a little more, but not very far from hitting him, and the other teacher and I, because he was sort of coming from that

other direction, as Ms. Peters said, as soon as we saw him we told him to stop but he kept on running, and the car had to slam on its brakes ...."

One or both of these accounts was a complete fabrication of the truth. If the car was picking up or dropping off a student, why was the car permitted onto school grounds during a fire drill and how could the car be in motion if it was discharging or picking up a passenger? If Ms. Peters' account is correct, there would be students outside saving Richard. If Ms. Milgrim's account was correct, no students were outside and the only witnesses were herself and an unnamed teacher. If neither were correct, Richard did nothing wrong that day.

The same result must follow with reference to the incident whereby Richard allegedly ran out of the building and then banged his head against the wall. Geffrey Waxman rebutted this allegation. This testimony reveals that Richard did not leave the building for no reason.

"Q. And did you discuss with either Mr. Palmadesso or Mr. Greco the IWC and what role that played in the suspension?

A. Yes, according to my son, he said that's normally when you go to the IWC, you walk out through the breezeway to get there, and I thought, you know, that he ran out of the building. I wanted to know, was he running out of the building or was he actually going to the IWC?

Q. Did you discuss that with him?

A. Yes, Mr. Greco showed me how most people go to the IWC and it is through the breezeway. He showed me the IWC is on the other side of the doors. I think there is a picture of the breezeway where I can show you. [indicating] As you can see, the principals' office doors are on this side of the breezeway, IWC are on the other side. There are actually four doors, only one of them are opened, and according to my son, he chose the one that wasn't open. He banged his head and then he fell back and he laughed about, but the door was not opened."

Very simply, Richard did not run away on this occasion and did not display any dangerous behavior. He did not run outside the building, but went to the IWC as he was told by Mr. Palmadesso and Mr. Greco, the Guidance Counsellor.

The record also reveals that the third and climatic incident, which concerned Richard attempting to obtain chocolate milk and then being interfered with by the teacher's aides also occurred under mitigating circumstances. Richard, a known asthmatic, attempting to quench his thirst after playing outside, tried to buy a can of chocolate milk from a vending machine. He had the can crushed in his hand by one aide while being accosted from behind by another aide. Richard was then chased out of the building and nearly onto the Long Island Expressway service road. Respondent attempted to justify its severe reaction to this matter by claiming that Richard had entered the service road of the Long

Island Expressway, adjacent to the school. Therefore, Respondent, opined, Richard is an unacceptable risk.

Rather than supporting Respondent's position, the preponderance of the evidence revealed that Richard did not actually enter the service road and, in fact, never left the school grounds. Even the suspension letter, signed by Mr. Palmadesso and written with the help of the Roslyn School District's attorneys, indicated that Richard "ran off school grounds at or near the Long Island Expressway service road." It is impossible to be both. Either Richard was on or Richard was near the service road. If Mr. Palmadesso was the person who was at the scene, why did he write these words in his letter of suspension? Why did Mr. Palmadesso need a lawyer to instruct him to write on or near when he knew where Richard was? Did it have to do with petitioners filing a police report about the incident and the School District needing an excuse for obtaining an injunction barring Richard from school? On cross-examination, the following exchange occurred between Mr. Palmadesso and counsel:

> "Q. You see where it says that Richard was suspended from school for 'running off school grounds at or near the Long Island Expressway service road?
>
> A. Right.
>
> Q. Is there a reason you wrote near, instead of on –
>
> A. It says on, and also I consulted with the district's attorneys and this is the letter, this is how they asked me to phrase the letter."

Both Richard Waxman and Geffrey Waxman also categorically denied that Richard had run onto the service road.

The record also revealed that it was Respondent's conduct that precipitated this incident in the first place. All Richard was seeking to do was obtain a drink because he was thirsty. It was the school aides who escalated the situation by crushing the can of chocolate milk in his hand by one teacher's aide while the other aide grabbed Richard from behind. On cross-examination, the following exchange occurred between Mr. Ingegno and counsel:

> "Q. OK. Now could you describe the way that you and Mr. Lobelia took the can away from Richard?
>
> A. When I walked in Mr. Lobelia had the can. He was holding Richie's hand and the can. They were all one at that point. I said, I'll pull his hands and he was fighting to let it go. It was a two second thing, once I came in I grabbed his hands. We got the can away, of course, Richie had opened it. We saw him try to open it and some of the stuff spilled out.
>
> Q. Did the can get crushed at any point?
>
> A. I don't remember, the think it might have, but I can't say positively.
>
> Q. Did it get crushed while it was in Richard's hand?

A. I can't say if it did or it didn't. I do know it was closed when I got there and then it was open and I did see him try to pop the top off.

Q. At any point in time did you grab Richard from behind?

A. No, all I did was, I might have gone behind him to separate his hands but I never grabbed him.

Q. There was a point in time when you were actually physically around him, had your arms around him and his body to grab the can in front of you?

A. Yes, I guess so.

Q. Did you ever bring your arms underneath his hands?

A. No, I pulled him apart.

Q. Do you know what a full Nelson is?

A. Yes, it's this (indicating).

Q. Did you ever do that?

A. No, no."

By restraining him and by crushing the can in his presence, Richard became extremely alarmed. Even Mr. Palmadesso, the Principal, conceded that he knew that the

school aides had tried to physically take the can from Richard. Moreover, the aides themselves conceded that they utilized physical force on Richard. This incident precipitated Richard, who was ten years old at the time, to run away from school personnel in fear for his safety.

B. Proceedings Below

It was as a result of this hearing that the Supreme Court of the State of New York (Segal, J.) issued a Memorandum Decision and Order dated January 16, 2001.

In the Memorandum Decision and Order, Justice Segal held:

> "Pursuant to 20 USC 1415(j) and Education Law 4404(4)(a), a student shall remain in the student's then current educational placement until the completion of proceedings pursuant to said statutes to determine whether or not the student is disabled within the meaning of the statutes. Accordingly, during the pendency of proceedings under said statutes, a school district may not unilaterally change a student's placement from classroom instruction to homebound schooling even where that student poses a danger to himself or others (*Honig v. Doe*, 484 US 305). A school district may, however, obtain court ordered injunctive relief, pursuant to 20 USC 1415(e)(2), authorizing the district to extend the suspension upon proof that maintaining the student in the current placement is substantially likely to result in injury to the student or others (*see*, *Honig v. Doe*, supra;

East Islip Union Free School District v. Anderson, 161 Misc2d 945)."

Justice Segal then held that Respondent had met this burden and, therefore, concluded:

> "... a preliminary injunction is granted continuing Richard's suspension and enjoining his attendance in school until such time as the referral seeking testing has been denied or until the testing has been completed and reviewed by the CSE."

Clearly, the basis of Justice Segal's Memorandum Decision and Order were the two (2) suspensions that Richard had received. In his Memorandum Decision and Order, Justice Segal acknowledged that he was acting to "extend" the suspensions.

The Court, in considering this motion, cannot ignore developments which occurred subsequent to Justice Segal's Memorandum Decision and Order. On March 28, 2001, Richard P. Mills, Commissioner on Education of the State of New York, sustained Petitioners' appeal of both suspensions. The Commissioner, in separate decisions, ordered that Richard's suspensions be annulled and expunged from his record.

Since Justice Segal's Memorandum Decision and Order, Richard continued in psychotherapy with Ronald I. Cohen, Psy.D., once to twice per week. In a letter dated February 11, 2001, after Justice Segal rendered his Memorandum Decision and Order, Dr. Cohen noted that Richard has been making "steady progress" in terms of the factors enumerated in the letter.

Richard has also been seeing Elliot Goldman, Ph.D., a licensed Psychologist at Schneider Children's Hospital. Dr. Goldman has seen Richard several times. Dr. Goldman noted the deleterious effect Richard's isolation from the school population is having on him. Dr. Goldman stated that Richard "would greatly benefit from a return to a regular school schedule." Furthermore, at the request of Richard's parents, Dr. Goldman conducted a full battery of psychological testing. Richard, again, scored academically well above his grade level and Dr. Goldman found Richard had no thought or psychological disorders and that Richard was not a danger to himself or others. Furthermore, before making this finding, Petitioners discussed the concerns, allegations and anecdotal records that the School District maintained with Dr. Goldman. Petitioners gave the School District a copy of Dr. Goldman's report, which included his recommendation that Richard be returned to a regular education setting. Petitioners offered the School District the opportunity to meet with Dr. Goldman, but it refused.

On or about March 23, 2001, Respondent served a Complaint upon Petitioners seeking to permanently enjoin Richard's attendance.

Meanwhile, on July 12, 2001, the State Review Officer affirmed Respondent's position that Richard be evaluated. To date, Richard remains barred from attending school. Believing that this decision was grossly erroneous, both on the facts and the law, Petitioners duly filed a Notice of Appeal to the Appellate Division of the Supreme Court of the State of New York Second Department.

In a Decision and Order dated April 22, 2002, the Appellate Division of the Supreme Court of the State of New York, Second Department, affirmed the Memorandum

Decision and Order of the Supreme Court of the State of New York. In doing so, the Appellate Division, held:

> "The evidence submitted by the respondent, Roslyn Union Free School District, clearly demonstrated that permitting the infant appellant to return to regular classroom instruction is substantially likely to result in injury to himself or to others. The undisputed evidence most notably reveals that he has run out of classrooms, as well as the school building, dangerously close to the Long Island Expressway, without permission, chased other students in the classroom, hit teachers and students with either a folder or crumpled paper, and chewed on sharp objects while leaning back in his chair. Accordingly, the Supreme Court properly granted a preliminary injunction extending the suspension from school of the infant appellant and placing him on homebound instruction pending the completion of a psychiatric evaluation and a review by the School District's Committee on Special Education."

Petitioners then sought review by the New York State Court of Appeals. Petitioners, by Notice of Motion dated May 22, 2002, moved, pursuant to the New York Civil Practice Law and Rules, before the Appellate Division of the Supreme Court of the State of New York, Second Department, for leave to appeal to the New York State Court of Appeals. By Decision and Order on Motion entered September 18, 2002, the Appellate Division of the Supreme Court of the State of New York, Second Department, denied petitioners' motion. Thereupon, on October 3, 2002,

petitioners sought leave to appeal from the New York State Court of Appeals. On December 12, 2002, the New York State Court of Appeals dismissed petitioners' motion to appeal. No rehearing was requested.

This petition for writ of certiorari follows because the New York State Courts decided an important question of federal law in a way that conflicts with a relevant decision of this Court, to wit: *Honig v. Doe*, supra.

REASONS FOR GRANTING THE WRIT

1. The Decisions of the Courts of the State of New York, with reference to the federal question involved herein, conflict with the Decision of this Court in *Honig v. Doe*, 484 U.S. 305 (1988)

Petitioners respectfully submit that the Decisions of the Courts of the State of New York, with reference to the federal question involved herein, conflict with the Decision of this Court in *Honig v. Doe*, 484 U.S. 305 (1988).

The relevant statutes involved herein are the Individual's with Disabilities Education Act ("IDEA"), 20 USC §1400, et seq., and the related New York statute, Education Law §4404. These statutes ensure that all children with disabilities have available to them a free appropriate public education. These statutes also ensure that the rights of handicapped children and their parents are protected. See, e.g., *King v. Pine Plains Central School District*, 918 F.Supp. 772, 776 (SDNY 1996); *Cronin v. Bd. of Education of East Ramapo Central School District*, 689 F.Supp. 197, 200-201 (SDNY 1988).

Because Congress envisioned a significant parental role, both the federal and state statutes establish a variety of procedural protection that ensure parents have an opportunity for meaningful input into all decisions affecting their child's education and the right to seek review of decisions with which they disagree. *Honig v. Doe*, supra. at 598; *Cronin*, supra. at 200.

These procedural safeguards include:

> "[T]he right to examine all relevant records with respect to the identification, evaluation, and educational placement of their handicapped child, prior written notice when an educational agency either initiates or refuses to initiate a change in the child's placement, and an opportunity to have an impartial due process hearing with respect to any complaints parents might have concerning their child's education. 20 U.S.C. §1415(b)(1), (2). The Act also provides that, at the conclusion of the impartial hearing, the aggrieved party can seek further administrative review and, if unsuccessful, can ultimately appeal by filing a civil action in any state or federal court. 20 U.S.C. §1415(c), (e)(2)." *Id.* at 200-201.

Crucial to ensuring that the rights of both children and parents are protected, by both the federal and state statutes, is the so-called "stay-put" provision. This provision governs the placement of the child while review proceedings are pending. Unless the parent and school district agree otherwise, the child shall remain in his then current educational placement. 20 U.S.C. §1415 (e)(3), New York Education Law §4404(4).

The stay-put provision recognizes that:

> "danger of excluding a handicapped child entitled to an educational placement from that placement was much greater than the harm of allowing a child not entitled to an educational placement to remain in that placement during the pendency of judicial proceedings. Thus, the statute provides that all handicapped children, regardless of whether their case is meritorious or not, are to remain in their current placement until the dispute with regard to their placement is ultimately resolved." *Cronin* at 202.

Courts have found that expulsion of a handicapped student constitutes a "change in placement" under the relevant Acts. *Cronin* at 202.

This Court in *Honig v. Doe* has described the stay-put provision as a "clear directive" and has stated that the language is "unequivocal." *Id.* at 323. The Supreme Court continued that a violation of the stay-put provision is presumptive evidence of irreparable harm. This provision has been further referred to as a "status quo" provision. *Vander Malle v. Ambach*, 673 F.2d 49, 52 (2d Cir. 1982)

In *Honig v. Doe*, this Court refused to read a dangerousness exception into the stay-put provision and declined to give school district officials the authority to remove dangerous or violent children from school during the pendency of administrative proceedings.

This Court, however, in *Honig v. Doe*, authorized a very narrow judicial exception to the stay-put provision,

where a school district can establish that the current placement is "substantially likely to result in injury either to [the handicapped child] or to others. *Id.* at 328. The court recognized that there is a presumption in any such action "in favor of the child's current educational placement." *Id.* In doing so, the Supreme Court stated "Nor do we think that §1415(e)(3) operates to limit the equitable powers of district courts such that they cannot, **in appropriate cases, temporarily enjoin** a dangerous disabled child from attending school." *Id.* at 327 (emphasis added). This is the basis upon which the New York Courts purported to act herein.

However, Petitioners respectfully assert that the New York Courts distorted this Court's rationale in *Honig v. Doe* and its very narrow judicial exception and gave itself wide authority, which this Court in *Honig* had refused to give school districts and never intended to give to courts. The New York Courts herein interpreted the exception carved out in *Honig v. Doe* much too broadly. Very simply, despite the offering of a series of incidents involving Richard, there was simply no indication that Richard's placement in school "is substantially likely to result in injury either to himself or to others."

Clearly, the three "major incidents" forming the basis of Respondent's application were not sufficient to result in the drastic action taken by the New York Courts and do not properly show that Richard is a substantial threat to himself or others. Moreover, the New York Courts misapplied this Court's ruling in *Honig v. Doe* by imposing the injunction pending the completion of testing, a justification not permitted by *Honig v. Doe* and one which chills the parents' right to contest the need for testing. As such, the New York Courts' conclusions herein are, with reference to the IDEA, in conflict with the decision of this Court in *Honig v. Doe*.

This Court, in *Honig v. Doe*, and thereafter, did not attempt to offer guidelines for the application of its narrow exception to the stay-put provision. *Clinton County R-III School District v. C.J.K.*, 896 F.Supp. 948, 949 (W.D. Mo, 1995). This Court should, therefore, utilize the within matter to offer guidelines for the application of its narrow exception to the stay-put provision, which apparently it has never done.

In fact, a review of case law reveals a paucity of judicial decisions involving a district's application to invoke the *Honig* exception and have a court grant injunctive relief against a student's continued attendance. Because of the paucity of case law, we must review decisions from other states to see how they have interpreted the statute and *Honig v. Doe*. However, one thing is clear, the allegations against Richard do not rise to the level that can justify the drastic action undertaken against him.

The court in *Clinton Co.*, supra., attempted to offer its interpretation of what must be required for a court to intervene. There, the court was confronted with a school district's application for "short-term" relief, where it alleged that the student had made repeated threats to school officials and students, including threatening a teacher to make her "black and blue"; and threatening to place an explosive device in the principal's car. The school district also alleged that the student had violently thrown furniture and other objects, including one situation where another student was injured. The district contended that the student was totally out of control and that the teachers were afraid of him.

The court in *Clinton Co.* then noted "No reported ruling by a court has a recitation of facts in which a school district even claimed to avoid the stay-put provision when the

physical dangers were limited as proven in this case." *Id.* at 951. The court then held:

> "Property damage is apparently not enough to authorize relief. Disruption of the educational process apparently does not open the door for early relief. While the danger of personal injury is undefined, it seems that it must be of a distinctly significant nature, going well beyond what may be typical for even behaviorally disturbed students, before **extraordinary relief** is merited. Danger must not only be likely (very possible), but must be 'substantially' likely. The Supreme Court's language is not unlike that of a statutory test for the involuntary commitment of persons."(emphasis added)

This Court should express a similar interpretation. There was absolutely no evidence in the record that Richard ever actually injured anyone; that he ever displayed any weapons; that there was an imminent and real danger of violence or that his behavior went "well beyond what may be typical for even behaviorally disturbed students" in order to justify the extraordinary relief that the lower court imposed.

A similar result was reached in *M.P. by D.P. v. Governing Board of the Grossmont Union High School District*, 858 F.Supp. 1044 (S.D. Cal. 1994). There, the school district alleged that a student who had received 16 referrals for discipline, including fighting, insubordination and disruptive behavior, had been most recently found in possession of a pellet gun on school property. The school district attempted to obtain injunctive relief barring the student's attendance on the ground of dangerousness. The

court refused to grant relief holding that "In the present case, although the bringing of a gun to school could result in violence, the [student] did not attempt to use the gun nor did he show the gun off and create the possibility of an accidental shooting." *Id.* at 1050.

In reaching this decision, the court in that case, also considered *Honig v. Doe*. The court, in *M.P. by D.P.*, supra., noted, unlike the lower court herein, that the New York Courts herein, that this Court in *Honig v. Doe*, despite recognizing a narrow exception to the stay-put provision, **actually held that expulsion was not appropriate** in that particular case. This Court had so held, despite the violent nature of the student's action in that case and the advanced age of the student. The student in *Honig v. Doe* had choked a fellow student with sufficient force to leave abrasions on the child's neck and had also kicked out a school window.

There can be no doubt that the fact pattern in *Honig v. Doe*, upon which the New York Courts so heavily relied, was much more egregious than the fact pattern at bar. Although recognizing that there are some circumstances under which a court may intervene, this Court recognized that its own fact pattern did not present such a case. It is, therefore, inexplicable and highly ironic that the New York Courts could have utilized *Honig v. Doe* and its very narrow exception to justify Richard's expulsion, when this Court itself refused to expel the violent student in the very case in which it carved out the exception.

The Ninth Circuit in *Hacienda La Puente School District of Los Angeles v. Honig*, 976 F.2d 487 (9th Cir. 1992) is also instructive. There, the court refused to intervene to expel a student with a long history of academic and emotional problems who had frightened a second student

with a stolen starter pistol. *Id.* at 489. Despite the presence of the starter pistol, the Ninth Circuit held at that expulsion was inappropriate.

Another court, *Light v. Parkway C-2 School District*, 41 F.3d 1223 (8th Cir. 1994), has even gone further in interpreting *Honig v. Doe*. Not only must the school district meet the heavy burden as discussed hereinbefore, but it must also "show that it has made reasonable efforts to accommodate the child's disabilities so as to minimize the likelihood that the child will injure himself or others." *Id.* at 1228. The court noted that "School district's should not seek to remove disabled children until reasonable steps have been taken to mitigate the threat of injury." *Id.* at 1228. This, said the court, is required by 20 U.S.C. §1400, et seq.. The court then held "Before exercising its equitable authority to remove a disabled child from any placement, a district court should be satisfied that the school district has made reasonable use of 'supplementary aids and services' to control the child's propensity to inflict injury." *Id.* No such showing was ever made by Respondent in the case at bar.

Under all of the circumstances present herein, it is respectfully submitted that the record that the New York Courts were not justified in applying the narrow exception enumerated in *Honig v. Doe*. Since there is a paucity of case law involving this issue and since no guidelines or parameters have been set by this Court after *Honig v. Doe*, this petition should be granted so that the Court may reconcile the conflict between the New York Courts' decisions and the prior decision of this Court.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

WOLIN & WOLIN, ESQS.
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APPENDIX A

STATE OF NEW YORK,
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the twelfth day of December 2002

Present, Hon. Judith S. Kaye, Chief Judge, presiding.

2-10 Mo. No. 1106	)
Roslyn Union Free School District,	)
Respondent,	)
v.	)
	)
Geffrey W. (Anonymous), et al.,	)
Appellants.	)
	)

A motion for leave to appeal to the Court of Appeals in the above cause having heretofore been made upon the part of the appellants herein, papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is dismissed upon the ground that the order sought to be appealed from does not finally determine the action within the meaning of the Constitution.

/s/ _____
Stuart M. Cohen
Clerk of the Court

APPENDIX B

SUPREME COURT OF THE STATE OF NEW YORK APPELLATE DIVISION: SECOND JUDICIAL DEPARTMENT

[Filed September 18, 2002]

1194m
A/sl

MYRIAM J. ALTMAN, J.P.
LEO F. McGINITY
SANDRA L. TOWNES
STEPHEN G. CRANE, JJ.

2001-02556)
)
Roslyn Union Free School District,)
Respondent,)
v.)
)
Geffrey W. (Anonymous), et al.,)
Appellants.)
)
(Index No. 18399/00))
)

DECISION & ORDER ON MOTION

Motion by the appellants for leave to appeal to the Court of Appeals from a decision and order of this court, dated April 22, 2002, which determined an appeal from an

order of the Supreme Court, Nassau County, entered January 16, 2001.

Upon the papers filed in support of the motion and the papers filed in opposition thereto, it is

ORDERED that the motion is denied.

ALTMAN, J.P., McGINITY, TOWNES and CRANE, J.J., concur.

ENTER:

James Edward Pelzer
Clerk

APPENDIX C

SUPREME COURT OF THE STATE OF NEW YORK APPELLATE DIVISION: SECOND JUDICIAL DEPARTMENT

[Filed April 22, 2002]

9623B
C/jv
Argued - March 22, 2002

_____AD2d_____
MYRIAM J. ALTMAN, J.P.
LEO F. McGINITY
SANDRA L. TOWNES
STEPHEN G. CRANE, JJ.

2001-02556

Roslyn Union Free School District,
Respondent,
v.

Geffrey W. (Anonymous), et al.,
Appellants.

Wolin & Wolin, Jericho, N.Y. (Alan E. Wolin of counsel), for appellants.

Jaspan Schlesinger Hoffman, LLP, Garden City, N.Y. (Stanley A. Camhi and Scott Fisher of counsel), for respondent.

DECISION & ORDER

In an action, inter alia, to permanently enjoin the infant defendant from regular instruction at the Roslyn Middle School and to place him on homebound instruction, the defendants appeal from an order of the Supreme Court, Nassau County (Segal, J.), entered January 16, 2001, which, after a hearing, granted the plaintiff's motion for a preliminary injunction extending the suspension from school of the infant defendant and placing him on homebound instruction pending the completion of a psychiatric evaluation and a review by the Committee on Special Education of the plaintiff Roslyn Union Free School District.

ORDERED that the order is affirmed, with costs.

Pursuant to 20 USC § 1415 (j) and Education Law § 4404 (4) (a), a student shall remain in his then-current educational placement during the pendency of any proceedings regarding whether he is disabled as contemplated by these statutes. As such, even where a student poses a danger to himself or others, a school district may not unilaterally change the student's placement from regular instruction to homebound instruction while such proceedings are pending (*see Honig v Doe*, 484 US 305, 327-328). However, a school district is entitled to seek injunctive relief, pursuant to 20 USC § 1415 (k) (2) (A), authorizing it to extend a student's suspension upon a showing that maintaining the student in his current placement is substantially likely to result in injury to himself or to others (*see Honig v Doe, supra; East Islip Union Free School Dist. v Andersen*, 161 Misc 2d 945, 948).

The evidence submitted by the plaintiff, Roslyn Union Free School District, clearly demonstrated that permitting the infant defendant to return to regular classroom instruction is

substantially likely to result in injury to himself or to others. The undisputed evidence most notably reveals that he has run out of classrooms, as well as the school building, dangerously close to the Long Island Expressway, without permission, chased other students in the classroom, hit teachers and students with either a folder or crumpled paper, and chewed on sharp objects while leaning back in his chair. Accordingly, the Supreme Court properly granted a preliminary injunction extending the suspension from school of the infant defendant and placing him on homebound instruction pending the completion of a psychiatric evaluation and a review by the School District's Committee on Special Education.

Altman, J.P., McGinity, Townes and Crane, JJ., concur.

ENTER:

James Edward Pelzer
Clerk

APPENDIX D

SUPREME COURT, NASSAU COUNTY

PART 5

BY: MARVIN E. SEGAL

DATED: JANUARY 5, 2001

INDEX NO. 018399/00

MOTION DATE 1/4/01
MOTION #1

ROSLYN UNION FREE SCHOOL DISTRICT,
Plaintiff(s)

-against-

GEFFREY WAXMAN and GAIL WAXMAN, as Parent and Natural Guardian of RICHARD WAXMAN, a Minor and RICHARD WAXMAN,
Defendant(s)

MEMO DECISION AND ORDER

This is an action commenced pursuant to 20 USC 1400, et seq. and Education Law 4401 et seq. wherein the plaintiff school district seeks a permanent injunction enjoining

Richard Waxman, an eleven year old student in the sixth grade at Roslyn Middle School, from attending school, and suspending him from regular instruction and placing him in homebound instruction. By Order to Show Cause dated November 21, 2000, the plaintiff moved for preliminary injunctive relief pursuant to CPLR § 6301 pending the completion of a psychiatric/psychological evaluation of the child and a review of the evaluation by the school district's Committee on Special Education (CSE).

Pursuant to a "so ordered" written stipulation executed by the parties, the application for a preliminary injunction was adjourned to afford Richard and his parents the opportunity to evaluate a temporary alternative educational program for Richard administered by the Educational Assistance Corporation in Port Washington. This program was not deemed satisfactory by Richard's parents. The application for a preliminary injunction was set down for a hearing which commenced on January 3, 2001 and concluded on January 4, 2001. The plaintiff called seven witnesses to wit: Ms. Peters, Richard's social studies teacher; Ms. Milgrim, Richard's core subjects teacher; Ms. Mancia, Richard's home and career skills teacher; Ms. Arcarola, Richard's science teacher; Ms. Murphy, a teaching assistant; Mr. Ingegno, a teaching assistant, Mr. Palmadesso, principal of the Roslyn Middle School; and Ms. McGovern, an administrator whose duties include the administration of the Individuals with Disabilities Act (IDEA), 20 USC 1400 et seq.

Richard Cohen, PhD., a licensed psychologist; Richard Waxman, and Richard's father, Geffrey Waxman

testified in opposition to the application for a preliminary injunction.

At the conclusion of the hearing, the court reserved decision. Based upon the testimony adduced at the trial and the exhibits received in evidence, the court makes the following findings of fact and conclusions of law:

Richard Waxman (Richard) entered the Roslyn School District as a fifth grade student in the East Hills Elementary School in November, 1999. He previously was a student in the Scarsdale School District. On or about March 15, 2000, the principal of the elementary school, Mr. Kaplan made a referral to the CSE seeking an evaluation to determine whether or not Richard had a disability which warranted his classification as a student with disabilities pursuant to 20 USC 1400 et seq. By letter dated April 12, 2000, Richard's parents objected to the referral and to any testing. Pursuant to 300 NYCRR 200.5, upon the parents' refusal to consent to a initial evaluation, the board of education of the school district must commence a formal hearing seeking authority to conduct an evaluation of the child without the parents' consent. The informal hearing was recently completed and a decision by the Hearing Officer is expected in about one month.

On October 27, 2000, Richard was suspended from school for two days by Mr. Palmadesso, principal of the Middle School. Richard did not return to school until on or about November 14, 2000. On November 15, 2000, Richard was suspended by Mr. Palmadesso, for five days. On November 21, 2000, the plaintiff obtained a temporary restraining order extending Richard's suspension. Plaintiff

now seeks a preliminary injunction continuing the period of suspension.

Pursuant to 20 USC 1415 (j) and Education Law 4404 (4) (a), a student shall remain in the student's then current educational placement until the completion of proceedings pursuant to said statutes to determine whether or not the student is disabled within the meaning of the statutes. Accordingly, during the pendency of proceedings under said statutes, a school district may not unilaterally change a student's placement from classroom instruction to homebound schooling even where that student poses a danger to himself or others (*Honig v. Doe*, 484 US 305). A school district may, however, obtain court ordered injunctive relief, pursuant to 20 USC 1415 (e) (2), authorizing the district to extend the suspension upon proof that maintaining the student in the current placement is substantially likely to result in injury to the student or others (*see, Honig v. Doe*, supra, *East Islip Union Free School District v. Anderson*, 161 Misc2d 945).

The Court finds that the plaintiff has met this burden.

Ronald Cohen, PhD., the psychologist who testified on behalf of Richard and his parents, testified that Richard's social and emotional maturation was significantly regressed. He diagnosed Richard as suffering from an oppositional, defiant disorder, and testified that Richard's parents have great difficulty controlling Richard's behavior. He found that Richard's parents are unable to get Richard to respect and go along with the parents' boundaries and rule making. Dr. Cohen testified unequivocally that in his opinion, Richard's parents should consent to the testing requested by the school

district so that Richard could get services he requires. Dr. Cohen testified that the social interaction of a school setting would benefit Richard and that he should be returned to school under the "right psychological and social conditions". Dr. Cohen stated that he had asked Richard's parents to provide him with information concerning Richard, which they refused to give him; and he conceded that they brought Richard to see him, commencing on October 18, 2000, for the purpose of having him testify.

The testimony elicited from the various school personnel demonstrated that, like Richard's parents, the teachers, teachers assistants, assistant principal and principal of Richard's school are unable to get Richard to respect boundaries and comply with rules, and that Richard's continued placement in classroom instruction is substantially likely to result in injury to Richard and others.

According to the testimony of Ms. Peters and Ms. Milgrim, on one occasion, after hearing an emergency bell, Richard disregarded all rules concerning lining up with his class and exiting the building in an orderly fashion. Instead, Richard ran out of the classroom, out of the building, and into a traffic circle by the school entrance. A car in the traffic circle jammed on its brakes, stopping only a foot from Richard.

According to the testimony of Mr. Palmadesso and Mr. Ingegno during the ninth period on October 27, 2000, Richard was found outside the front of the school building, running around and swinging around the concrete poles between the breezeway and the driveway. When they

attempted to persuade him to go inside the building, Richard ran into a glass and metal door several times, slamming his body against the door and banging his head. It took more than five minutes to get Richard back inside the building.

Mr. Palmadesso and Mr. Ingegno and Richard himself testified that on November 15, 2000 Richard exited the cafeteria and ran into the school field. He ran the perimeter of the school yard, first toward Norther State Parkway, then North on Locust Lane, crossing two driveways utilized by cars and buses approaching and leaving the school. He continued to run toward the service road of the Long Island Expressway. Mr. Palmadesso and Mr. Ingegno testified that Richard exited school grounds through the "walker gate" and actually stepped onto the service road where Mr. Palmadesso grabbed him from the path of an on-coming truck. Richard denies that he left school grounds and denies that he stepped into the service road. The inconsistency of the testimony on this issue is not dispositive. During this incident, Richard admittedly led the school principal, assistant principal, a school assistant, and the head custodian on a chase through the perimeter of the school grounds through woods and across two driveways, until the chase ended either on or near the service road of the Long Island Expressway. It is unquestionable that there is a substantial likelihood of injury to an eleven year old student who leaves the school building without permission and supervision.

Richard's teachers and the teachers assistants testified to incidents in which Richard chased other students around the kitchen area of his home skills class, the science lab, and a crowded cafeteria. He chased another student with a pencil in

his hand. The teachers described incidents during which Richard placed various objects in his mouth including pen caps, pen shards, wads of paper, and masking tape picked up off the floor. Richard threw wads of wet papers towels at other students and on two occasions spit at other students.

Ms. Milgrim testified that Richard banged himself on the head repeatedly with a 2 liter plastic soda bottle, and then threw a book in her direction. Ms. Mancia testified that he hit her and other students in the head with a soft paper folder. Ms. Arcarola testified that Richard intentionally rolled his wheeled book bag into the legs of other students, and that he repeatedly hit himself on the head with a plastic ruler. Ms. Mancia testified that Richard blocked the doorway of her classroom and prevented her from getting back into the room. Ms. Murphy testified that Richard blocked the door and pried her fingers off the knob when she tried to open the door.

Richard's behavior has not yet resulted in a significant physical injury to himself, another student, or a teacher. However, Mr. Palmadesso testified that Richard's behavior has become progressively out of control. The psychologist who testified on behalf of the defendants did not provide the court with any indication that Richard's ability to respect boundaries and comply with rules in the classroom had or would soon improve. Further, Richard's father testified that Richard is "fast"; that he can "bolt pretty quickly" and that if her were to run, an adult would have trouble catching him. It is clear that even under constant observation, Richard is likely to run out of the school building, put objects in his mouth, throw objects at others, chase and hit others. Accordingly, the court finds that Richard's continued placement in classroom

instruction is substantially likely to result in injury to Richard and or others.

There was testimony at trial by Ms. McGovern that if the Hearing Officer recommends that Richard undergo psychiatric and or psychological testing and his parents choose to appeal that determination, the exhaustion of all avenues of appeal could last beyond a year. Nevertheless, a preliminary injunction is granted continuing Richard's suspension and enjoining his attendance in school until such time as the referral seeking testing has been denied or until the testing has been completed and reviewed by the CSE.

This constitutes the decision and Order of the Court. The action is calendared for a status telephone conference on February 15, 2001 at 10:00 a.m. The plaintiff's counsel shall initiate sassistant conference. The telephone status conferences shall continue on the third Thursday of each month at 10:00 a.m. until the proceedings before the CSE are concluded.

January 8, 2001 /s/ _____
J.S.C.

Entered Jan. 16, 2001
Nassau County
County Clerk's Office